Clerks and Lumber Handlers Union Local No. 939, a/w Laborers' International Union of North America, AFL-CIO-CLC (Lumber and Mill Employers Association) *and* James Rickman. Case 32-CB-1283

26 March 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 19 September 1983 Administrative Law Judge David S. Heilbrun issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in support of the judge's decision and brief in opposition to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

At fn. 12 of his decision the judge erroneously found that Rickman did not testify that he heard any remark of Kirkland as assertedly made immediately upon Maines' concluding at the 7 September union meeting. Rickman did so testify. This inadvertent error does not affect the result herein.

DECISION

STATEMENT OF THE CASE

DAVID G. HEILBURN, Administrative Law Judge. This case was heard at Oakland, California, on May 26, 27, and 31, 1983, based on a complaint alleging that Clerks and Lumber Handlers Union Local No. 939, Laborers' International Union of North America, AFL-CIO-CLC, hereinafter called Respondent, violated Section 8(b)(1)(A) of the Act in that it failed to process a contractual grievance concerning the layoff of James Rickman (and others) by abdicating a duty to present the grievance in its most favorable light, by processing it in only a perfunctory manner and by failing to represent affected employees fairly and fully, all such conduct assertedly engaged in because of Rickman's persistence in demanding that Respondent comply with provisions of its constitution, bylaws, and the pertinent collective-bargaining agreement, also because of his persistence in processing such grievance, and for other unlawful reasons, all of which were unfair, arbitrary, and invidious as a breach of fiduciary duty owed to represented employees.

On the entire record and my observation of witnesses and consideration of posthearing briefs, I make the following

FINDINGS OF FACT AND RESULTANT CONCLUSION OF LAW

A. *Background*

Larsen Bros. Lumber Co., Inc., hereinafter called Larsen Bros., has operated for many years as a traditional metropolitan lumberyard selling finished wood products and building materials to homeowners and contractors. In common with other similar business firms its labor relations matters are handled by the Lumber and Mill Employers Association, hereinafter called LAMEA, which maintains an office at San Francisco and from which it provides association services to employer-members. The most recently expired of many collective-bargaining agreements reached and applied between LAMEA on behalf of its constituent employer-members and Respondent was that having a duration from July 1, 1979, through June 30, 1982. As customarily so, this contract was signed between Larsen Bros. and Respondent for continued application to a small work force fluctuating at around 10 persons. As a legal bargaining unit the group was stipulated to be all full-time and regular part-time employees performing work covered by and within the job classifications set forth in such collective-bargaining agreement, excluding all other employees, guards, management employees, and supervisors as defined in the Act.[1] Article VI of the contract, on the subject of wages, lists eight actual "agreed job classifications," only two of which, Lumber Clerks and Lumber Handlers, are particularly germane to the case.[2] The contract has a union-security clause requiring membership in Respondent upon 31 days in employment; however, dues checkoff is not provided. Article III sets forth basic definitions for persons doing work under terms of the agreement as

[1] LAMEA is composed of employers, including Larsen Bros., who engage in the milling and nonretail and retail sale of lumber products, with a purpose of its existence being that of representing such employer-members and negotiating and administering collective-bargaining agreements with various labor organizations including Respondent. Employer-members of the association, including Larsen Bros., in the course and conduct of their combined business operations annually purchase and receive goods or services valued in excess of $50,000 directly from suppliers located outside California. On these admitted facts I find LAMEA and Larsen Bros. is each now, and have been at all times material herein, an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act, and otherwise that Respondent is a labor organization within the meaning of Sec. 2(5).

[2] The classification of lumber clerk carried a 60-cent-per-hour higher wage rate through the last contract period than lumber handler. A third classification of those enumerated, certified grader, is more highly paid than lumber clerk, and was described as the only other "major" classification of actual significance to operations at Larsen Bros. However, a "foremen" classification is also shown, carrying an hourly rate 50 cents higher than lumber clerk, and this shall be referred to in the more detailed statement of pertinent facts.

employees. Two significant passages under this subject heading read:

> (b) The word Clerk as used herein means an employee who fills or supervises the filling of the orders of lumber and lumber yard specialties or the finished products of lumber such as sash, doors, trim, molding, panels, casework, metal products, pallets, etc., or to tally or grade or supervise the tallying or grading of the same or to do such other general utility work as may be required, provided however, that at the direction of the Employer, a Clerk shall do Lumber Handlers work.
>
> (c) The words Lumber Handler as used herein means any employee who handles lumber and lumber yard specialties or the finished product of lumber such as sash, doors, trim molding, panels, casework, metal products, pallets, etc., in or about lumber yeards, mills, docks, wharves and into or out of railroad cars or trucks and trailers or to construct pallets or to do such other general utility work as may be required.

Article X regarding seniority states in part:

> (a) In the event of a reduction in the number of employees by an Employer, employees shall be laid off in accordance with their job classification on the basis of the last man hired to be the first man laid off, subject to the qualifications of the employees, and in rehiring, the last employee laid off in a job classification shall be the first employee rehired. If the Union believes an employee has been treated unjustly, the Union may refer the matter to the Grievance Committee.
>
> (b) No employee shall acquire seniority until he shall have been continuously employed for 90 calendar days, after which period his seniority shall be retroactive to his date of hire.
>
> (c) Whenever a vacancy occurs in a skilled job and there are at the time employees who have sufficient aptitude and experience to fill the job, such employees in the order of their seniority shall be entitled to fair trial to qualify for said job. In the event that any such employee shall, in the opinion of the employer, fail to qualify, he shall revert to his former job without prejudice. In the event a lumber handler becomes an apprentice clerk he shall continue to be paid the lumber handlers rate until and unless the appropriate apprentice clerk rate is higher than the lumber handler rate, in which event he would be paid the higher of the two rates.
>
> (d) An Individual Employer and the Union may agree to a system of departmental seniority for a particular operation on such terms and conditions as are mutually agreeable. A request by either the Employer or the Union to meet and negotiate departmental seniority will require the other party to attend such meeting(s) and to seek to find agreement on a system of departmental seniority. Disagreement will not be subject to the grievance procedure.

The subject of grievance and arbitration procedure is covered by article IX entitled "Grievance Committee." Its pertinent provisions read:

> (a) There shall be a Grievance Committee composed of three members appointed by the Union and three members appointed by the Lumber and Mill Employers Association to act during the term of this Agreement on any matter concerning the violation of, or the interpretation put upon the Agreement. Each party shall make the names of its Committee members known to the other party within ten days of the date of this Agreement.
>
> (b) The Grievance Committee shall meet upon call of any interested party giving twenty-four hours notice by telegram or registered mail to all members of the Committee. The meeting shall be held at the time and place specified in the notice or at such other place or at such other time as all of the Committee members may agree upon. The decision of the majority of the Committee shall be final and binding on all parties during the life of this Agreement. If the Committee cannot agree on any question referred it within five days, and if either party desires to proceed to arbitration and makes such desire known to the other party, in writing, within five (5) working days thereafter, they shall then choose an arbiter who shall have no connection with either interested party and his decision shall be final and binding. Pendi[ng] the decision of any question referred to the Committee, no action affecting the mutual relations of parties to this Agreement shall be taken by any party. Work shall be continued in accordance with the provisions of the Agreement.
>
> (c) Grievances not filed within twenty (20) calendar days from the date of occurrence or the date the Local Union acquired knowledge of the grievance (whichever is later) are to be considered dropped.

Respecting the Larsen Bros. employee complement, the following stipulated (or asserted) particular facts obtain: Ray Haagenson[3] acquired union membership 10/23/67; Claude Ledsinger, hired 8/30/72, joined the Union 10/27/72; James Rickman, hired 5/10/(or 18)73, joined 7/27/73; Gary Haagenson, hired 10/1/77, joined 1/19/78. Additionally it is known that Robert Nielsen is now employed with 13 years' seniority at Larsen Bros. as a lumber clerk, while Rich Coughlen was another bargaining unit member who was laid off at the first of 1982, then subsequently recalled around May 1982 for yard and miscellaneous work. Ledsinger, too, was laid off in late January 1982, and after working only 3 days

[3] Harry Larsen is commonly viewed as the owner of this long-established business. His chief functionary as a lower corporate officer is Ray Haagenson, who has been with the firm since at least 1967 and performs a variety of managerial and other duties. Both these individuals have only peripheral significance to issues of the case and their exact roles, including their history of affiliation with the Company, were not precisely developed for the record and for this reason are not susceptible of accurate description.

on an intervening holiday weekend again was laid off permanently effective February 16, 1982.

At material times, Respondent was an individual constituent local of the International Union, and maintained a union hall and office in Oakland, California, from which its geographical jurisdiction covered nearby counties. Thomas Kirkland filled the position of business manager by spending mornings at the union office and afternoons in the field. He had held the position for about 1-1/2 years, after a career of about 8 years' rank-and-file employment in the retail/wholesale lumber business of this vicinity.

In this general setting this litigation relates to layoff and later protest of James Rickman, the Charging Party herein. Following approximately 8-1/2 years with Larsen Bros., during most of which time he was classified as a clerk following promotion from his original lumber handler position, he was notified of layoff for lack of work on December 28, 1981, to be effective January 1, 1982. His duties as a clerk had entailed writing tags in the office, working in the yard and warehouse, sorting, tallying, waiting on customers, cutting lumber, making up orders, loading and unloading trucks plus utility work. On approximately January 20, 1982, he went to Respondent's union hall and office to among other things request that Kirkland investigate his layoff as a possible violation of seniority rights in relation to Gary Haagenson.[4] Rickman then telephoned Kirkland on approximately February 10 to ask if anything had been learned. He was told the matter was being referred to the union district council for the metropolitan area. Additionally Rickman recalled being told that Kirkland had spoken with Harry Larsen who claimed that the Company considered the lumber clerk classification to be separately identifiable as inside clerk and outside clerk, implying that Gary Haagenson was the former and Rickman had been the latter. Following this inconclusive experience Rickman later applied for work at another lumberyard as a proposed "outside" clerk, and was given to understand by hiring officials there that the distinction was unknown in the industry. In consequence Rickman initiated what became a detailed exchange of correspondence on his situation, in which were interspersed numerous discussions, all of which constitute the basis for extracting salient facts of the case.[5]

The starting point of much that was written by involved persons was a letter dated May 28 from Rickman to Kirkland. It read:

> RE: Request for clarification of the definition of Clerk as stated in Article III-b of the Local Wage, Scale and Agreement.
>
> The above reference is in relation to our past conversation, in which, I requested you to investigate my lay-off and determine why a clerk (manager) with less senority was retained. You determined from the company's position that they claimed, there are more than one classification of clerks. However, the Wage, Scale and Agreement which is signed by *all* employers (our contract), states: "The word clerk . . . means and [sic] employee *who fills* or *supervises the filling* of the order of . . . or *to tally or grade* or *supervises the tally and grading* of same . . . ." I recognize no distinction between clerk classification. It is for this very reason why I am requesting the Executive Board and/or District Council for a clarification *only* of the classification of clerk.
>
> Although, I must admit there exist ambiguities in the way the definitions (in the Agreement) is worded—for instance, does it mean that an employer, superintendent, working foreman can perform clerk duties, if they are in the union? Is it safe to assume, I could bump a supervisor if he has less seniority? If not, then the supervisor is afford [sic] more protection by the fact that they are represented by the union and management. This violates Article II of the International Constitution.
>
> I would appreciate an immediate reply. Thank you.

This was followed by another letter from Rickman to Kirkland dated May 31 concerning circumstances at a different lumber and millwork company of the general vicinity at which Respondent was also party to a collective-bargaining agreement. This communication read:

> RE: Grievance—Clerk at El Cerrito Lumber, who is working and benefiting union benefits, but who is not a member of the union.
>
> *Background*
>
> The above reference is related to the conversation we had last year, when the Millmen were on strike. It was at that time when I presented you with the information that this particular Clerk was crossing the picket line and working. You informed me that there was little which could be done because this Clerk was non-union. I asked you, "How this occurred?" You informed me that when the El Cerrito Lumber was organized the employer wanted one clerk to remain non-union. It was agreed to by the union official negotiation. You, however, did not explain on what authority this was negotiated.
>
> *Basis of Grievance*
>
> First, it is my contention that, if the above is correct, that under Article Twelve (12), Section Three (3) Limitation of Powers, of the International Union Constitution, that the official was in violation. The synopsis of the Article expressed in content is interpreted to mean any act which a representative, or an employee commits that is conflicting with the International cannot bind the union, unless ordered by the International. Under Article One (1), Section

[4] All dates and named months hereafter are in 1982, unless shown otherwise.

[5] For the approximate period of May-September, there is superimposed on the unfolding of Rickman's job layoff protest, and the grievance that ensued on that point, a second subject of the local union officer nomination and election process. While this latter subject is not directly involved, there will be instances in which reference is made to matters in that regard.

Two (2), the Local Union's Constitution cannot supersede the International's authority.

Second, it is my contention that, Article Two (2), Section One (1), that this Clerk was shown preferential treatment, and it did not unite *all* persons and is not for the mutual benefit of the Local Union.

Third, under Article 1, Wage, Scale and Agreement, the Employer recognizes the Union as the bargaining agent for all employees performing work falling within the job classification. This implies that the Employer who signed the agreement, recognize the existence of a "closed shop."

Fourth, it is also my contention that this employee is benefiting by holding a job, while I, as a union member have been laid-off and out of work.

Kirkland testified that in the time shortly following these closely spaced letters he conferred with Joe Botelho, his predecessor as business manager, and representatives of other unions, for the purpose of obtaining some guidance on how to view matters raised by Rickman. He also recalled that in one or more routine visits to the Larsen Bros. premises he attempted to observe directly what Gary Haagenson was actually doing for the Company, and he spoke with rank-and-file members Nielsen and Coughlen concerning what they might know. Additionally he presented Rickman's correspondence to Respondent's executive board for the first of several times that would follow as this body convened for its regular meeting on the fourth Friday of each month. Finally Kirkland recalled the initiation of calls for legal advice to Respondent's attorney Mary Mocine. By late June nothing definite had materialized and Rickman wrote again to Kirkland on June 30 as follows:

> Subject: Letter dated May 28, 1982—Regarding a request for clarification *only* of the definition of Clerk
>
> I am writing in regards to the conversation we had today regarding to the above subject. You explained to me that the Executive Board on June 25th met and rendered no decision on the clarification of the definition of Clerk. The Executive Board referred the issue to the Union's Attorney because there were some legal ramifications. It was at this time you asked me if I wished to make a statement at the attorney's office. I am still somewhat unsure and puzzled why I need to make a statement to the attorney to help him render a decision on the above subject.
>
> Also, you stated that you had spoken to Mr. Harry Larsen and notified him that they were in violation of the contract. Although you brought the charge against Larsen, the more I thought about the issue, I am wondering if that was the correct step to take since the Union's Attorney have [sic] not rendered any decision to the above subject. However, I don't want you to think I am questioning your action—but, the analogy which might best apply to the above, is that, you don't inform the fox when you know he's in the hen house, for he may slip away, and offers no additional protection for the chickens.
>
> I am requesting that a written decision of the following be sent to me:
>
> 1. The Executive Board's meeting of June 25th on their decision to forward the above subject to the Union's Attorney;
> 2. The decision of the Union's Attorney on the above subject.
>
> Thank you.

Kirkland answered Rickman with the following letter dated July 1 and headed "RE: Request for Clarification of Clerk":

> [Y]our request for the clarification of the definition of Clerk according to this Unions [sic] agreement with Association and Non-Association lumber yards where we have a signed contract, has been put at abeyance until this Unions [sic] attorney can make a determination. This office will contact you about our course of action on this matter immediately following that determination.

About this same time a series of contacts ensued between Rickman and Kirkland. Rickman testified that Kirkland telephoned on July 1 to say "brash[ly]" that a grievance was being filed so as to be within the contractual 20 days of occurrence, and reference was made to the possibility of meeting with Respondent's counsel. Then on July 7 and again on July 12 Rickman spoke with Kirkland at the union office to ask if clarification from the attorney had been received. Hearing nothing further in the days that followed Rickman obtained Mocine's name from Kirkland on July 13 and telephoned her directly. He testified that her first response was whether he was calling to set an appointment, to which he replied that it would be premature. Rickman ascertained to his surprise that she did not have the initiating letter about "clarification" of status, but she solicited a copy from him which he provided. The vehicle was a cover letter dated July 13 transmitting his May 28 letter and Kirkland's eventual reply thereto dated July 1. This cover letter to Mocine read:

> Subject: Request for a clarification of the definition of Clerk as states in Article III-b of the Local Wage, Scale, and Agreement—Clerks and Lumber Handlers Union No. 939
>
> I am writing in regards to the conversation we had today regarding the above subject. I am somewhat embarrassed to find that you know little or nothing of my letter since I was under the impression your office was determining the legal ramifications of my request.
>
> Enclosed you will find a copy of the request dated May 28, 1982, pursuant to your request. Also, accompanying this letter is a copy of the letter from the Union which led me to the above impression. If there are any question [sic] I can be contacted at 655-1253.

> I would appreciate an immediate written reply to the above matter. Thank you.

Kirkland testified that meanwhile he had put Larsen Bros. on general verbal notice that they were in violation of the contract, and in order to best observe time-limit deadlines of the contract he filed the following formal written grievance with both LAMEA and the Company on July 6:

> [T]he Union demands a grievance on the grounds that the Company violated Article X (a) of the wage agreement, in that they laid off two men with Seniority over a man they retained.

Mocine had also written relatedly to Rickman (copy to Kirkland) by letter dated July 12 and headed "Re: Larsen Brothers" which read:

> I have discussed your grievance with Mr. Kirkland and I understand that you wish to discuss it with me. I would be happy to do so. Please give me a call to set up an appointment at your earliest convenience.

Mocine then wrote Rickman (copy to Kirkland) the following letter dated July 19:

> Re: Article III(b) of the Collective Bargaining Contract
>
> I am writing in response to your request for clarification of Article III(b) of the Contract. It is my understanding that the employee who remains at work is not really a lumber clerk as defined in the Contract. In fact, he is a plant clerical.
>
> There already is a "de facto" recognition of the creation of a new job classification not set forth in Article VI(a). I have advised Mr. Kirkland that it would be appropriate to negotiate the new classification of plant clerical into the Contract pursuant to Article VI(b). At any rate, since seniority is determined by job classification pursuant to Article X(a), the seniority of a plant clerical is not related to the seniority of a lumber clerk. Accordingly, your job eligibility is not affected by the retention of this clerical.
>
> If you have any questions, please give me a call.

Rickman answered this with a letter to Mocine (copy to Kirkland) dated July 22 which read:

> In response to your "Determination Letter" dated July 19, 1982, regarding the clarification of Clerk, I personally feel that the questions I was asking in regards to my rights under the *existing* contract have been circumvented. It is for this reason I am respectfully questioning the decisions you derived.
>
> First, in regards to your understanding that the employee, who remained is not a clerk, is erroneous. In fact, this employee by virtue of his position (co-owner and vice-president) had to supervise hourly employees as to what to ship, cut, sort, grade and tally. (This is under the definition of Clerk.)
>
> Second, as to "De Facto" practices, this argument is *moot* as it applies to the contract which was proposed, ratified, and accepted by all parties. Management was and is aware of the job classifications which were negotiated. It is my contention that "De Jure" takes precedent over all past practices when a contract is accepted by both parties.
>
> Third, I respectfully differ with your recommendation for the establishment of a "New Classification" because the employee in question is salaried (co-owner and vice-president); also, this employee's brother is salaried (co-owner and foreman); and the owner being salaried. This situation would create a classification which would strengthen management position.
>
> Lastly, I wish to thank you for your time and consideration.

Rickman testified that contemporaneously he spoke by telephone with Kirkland on July 23 asking the basis of Mocine's understanding that a "plant clerical" classification was applicable and whether such a change could be negotiated with the Company. He recalled Kirkland being vague about the matter, pointing out that he had only "inherited" the several historical circumstances at Larsen Bros. but that regardless a plant clerical classification would not be negotiated. The conversation became testy for a while, then calmed when Kirkland said he would seek further advice from Victor Van Bourg, attorney for the union district council of the overall vicinity. Rickman then on July 27 conversed with Mocine again by telephone to ask the basis of her determination as set forth in the July 19 letter. He testified that her first response was to ask whether he was trying to "set [her] up," and the conversation ended inconclusively with Rickman feeling "insulted." The following day he telephoned Kirkland about his freshly had conversation with Mocine, and Kirkland suggested that the two of them go together to see Mocine.

In consequence Kirkland wrote Rickman on August 4 as follows:

> RE: Clarification of the Job Classification of Clerk.
>
> [T]his letter is to have written record that this Union offered you a meeting with its attorney July 28, 1982 for the purpose of trying to answer your questions pertaining to the job Classification of Clerk and you declined this meeting. As per our telephone conversation I will have the Unions [sic] attorney pursue the ability of an owner and or a share holder of a lumber company to also be a Union member.

Rickman answered this by letter of August 5, a copy of which was also sent to the International Union.[6] This read:

[6] On July 28 Rickman had also written to Arthur Coia, general secretary-treasurer of the International Union, transmitting all documents in

Continued

In reference to your letter of August 4, 1982, I *have never refused* any appointment with the said attorney. The attorney stated her position in her determination letter dated, July 19, 1982 (carbon copy of that letter was sent to you).

In summation, I wish you would explain to me the purpose of the said meeting.

I wish to thank you for your time and consideration.

Rickman's referred communication to the International Union reached George Jenkins, an assistant regional manager then operating from Burlingame, California. His followup involved meeting with Rickman and Kirkland at Respondent's office on August 27,[7] and from this he wrote a letter on the matter to General President Fosco dated September 7. It read:

RE: Your communication of August 3, 1982, relative James E. Rickman, member of Clerks & Lumber Handlers Union, Local No. 939, Oakland, Ca.

In compliance with your communication and instructions from Vice President Warren, I went to Oakland under date of Aug. 27, 1982, to investigate the above referenced matter.

I met with Tom Kirkland, Bus. Mgr. of Local No. 939, and James E. Rickman, aggrieved member, relative termination of his employment with Larson [sic] Brothers, which he felt was in violation of the Seniority Clause of the Collective Bargaining Agreement of the Clerks and Lumber Handlers Union.

We discussed the communications and grievance at length. At this time, I learned that brother Rickman had filed a grievance in compliance with the terms of the Agreement; however, no grievance hearing had been held.

It was my recommendation, accordingly, that a grievance hearing be scheduled immediately, in order that a determination be made whether Mr. Rickman had been terminated justly in accordance with the provisions of the Agreement.

In keeping with this a grievance hearing became scheduled for October 1. Kirkland notified Rickman of this by letter dated September 9. The letter also enclosed a copy of "the demand for a grievance" that had been submitted, and referred Rickman to the International Union in regard to his request for a membership roster. Rickman prepared two significant prehearing communications, the first of which was a letter dated September 20 to Kirkland. It read:

I am requesting the following information be provided to me before the tentative October 1, 1982, hearing:

1. The wage scale of Mr. Ray Haagenson and Mr. Gary Haagenson as compared to the wage scale of the agreement.

2. If there is a written agreement between Mr. Gary Haagenson and Mr. Ray Haagenson and Larsen Brothers Lumber Company for a dues check-off.

3. Is there an existing dues check-off for these employees; why was Mr. Rickman denied a dues check-off when requested of Mr. Ray Haagenson?

4. If there isn't a dues check-off, why and how were Mr. Ray and Gary Haagenson afforded this privilege? Was it because they were company officials?

5. If there exist a dues check-off, how is the dues deducted; was it from their check, or does the company pay from the company funds?

6. What is Mr. Ray Haagenson and Gary Haagenson classification under the contract (new and old).

I do understand that Mr. Harry Larsen may refuse to provide you this information, but I believe this would establish an "Unfair Labor Practice" because they would not furnish you the information regarding employees under collective bargaining contract, and to solving a labor dispute.

Kirkland had arranged a preparatory meeting with Rickman for September 28, and at this time Rickman presented the following "written charges" in conjunction with his grievance.

I. Larsen Brothers' Lumber Company did establish false classification of "Inside Clerks," "Outside Clerks" and "Plant Clerical"; did establish these classifications in such a manner as to violate the "Union's Seniority" clause of the contract (Article X (10) of the agreement) without mutual negotiation as states in Article VI (6) (B) of the contractual agreement; thereby violating my rights and other union members under the agreement.

II. Larsen Brothers' Lumber Company did violate the "Union's Security" clause of the agreement (Article II (2) (a) by submitting Mr. Gary Haagenson's name to the union for affiliation under the classification of Clerk, yet, when a complaint was issued as to the seniority under this classification the company owner (Mr. Harry Larsen) claimed that Mr. Gary Haagenson was an officer of the company and "Plant Clerical." Which is a direct violation of the contract.

III. Larsen Brothers' Lumber Company did interfer [sic] and restrained employees in the exercise

his possession relative to his desire for "clarification" and stating that he felt a denial of rights had occurred because of lack of a "proper" response. General President Angelo Fosco referred this communication to the International Union's California office for handling that was soon to follow.

[7] Rickman was accompanied to the meeting by his uncle, John Rickman. Although introduced as a "representative" for Rickman (James), Jenkins took John Rickman to be an attorney whose presence would be inappropriate for an internal union matter. Upon this, John Rickman bowed out and the meeting proceeded from there. On August 31 Rickman (James) wrote to Kirkland in reference to this meeting, setting forth a request for "a *written answer* to what exact steps have been taken . . . to protect my seniority rights" and requesting a copy of the grievance as filed. This letter also alluded to Rickman's collateral request that he be furnished a copy of the Union's "membership roster." The letter ended with the familiar expectation of "an immediate reply."

of their rights under Section VII (7) and Section 8 of the N.L.R.A., by intimidating employees through indirect threat of reprisal.

IV. Larsen Brothers' Lumber Company did create an "*Unfair Labor Practice*" by appointing Mr. Ray Haagenson a "Working Foreman" and allowing the union to bargain for Mr. Ray Haagenson in this classification when he (Mr. Haagenson) is an officer of the company, thus, affording him double protection, and dual classification.

The grievance committee (sometimes referred to as the board or panel) consisted of Steve Taber, Kenneth Lusby, and Angelo Kunich, all union members and representing Respondent's side of the bipartite body. The employer delegation was David Smothers (who chaired the group), Thomas Waterman, and Carl Heuken II. The Employer was represented by Frederick Misakian, the labor relations consultant and executive vice president of LAMEA. Rickman's grievance was heard[8] and the grievance committee retired briefly, then returned to present its action. Based on two pages of notes about matters presented, the unanimous conclusion was written as "decline to here [sic] to a decision based upon facts of the case."

B. *Testimony Concerning Hearing Before Grievance Board*

Rickman testified that Kirkland made an opening statement about his grievance, and then asked him a few questions. He recalled that Misakian spoke next, saying that the Company claimed this grievance should not be heard because the Union had no jurisdiction to press it on the basis of Gary Haagenson being a managerial employee. Misakian displayed various documentation on the point, and explained to the grievance committee that Gary Haagenson had originally become a union member only as a good-faith gesture. Rickman testified that he broke in by plaintively asking Kirkland when he could "tell my side of the story," only to hear Smothers state he was out of order. Rickman then attempted to have affidavits of Ledsinger and former employee Bruce Cowan considered, both of which among other things recited how Gary Haagenson performed tasks of a lumber clerk. These were passed from him to Kirkland and on to Misakian, who successfully objected to their being taken into account. Rickman recalled again protesting about not being allowed to effectively speak on his own behalf, and he termed Kirkland's performance as that of failing to object to contentions of the Company and allowing a "filibuster" of the case.

Ledsinger was present during the entire hearing and testified to Kirkland and Misakian making opening statements in that order. He recalled a question by Smothers about Gary Haagenson's classification and that Ray Haagenson had contended Rickman refused certain jobs both at Larsen Bros. and elsewhere, all of which Rickman termed "a lie." Ledsinger recalled Misakian's rejection of his affidavit after it was presented to him by Kirkland, even though he could see that Ledsinger was available right at the hearing.

Kirkland testified that he read a prepared opening statement and made contractual arguments on which the grievance was based, following which Misakian responded in opposition. Kirkland then undertook questions of Rickman that had also been written out in advance, but the process broke down somewhat as Smothers and others on the grievance committee interjected their own questions. Kirkland recalled that Rickman had various things to say as matters proceeded, and that Misakian made a "grandstanding" effort supported with numerous documentary handouts. Ray Haagenson and Rickman also disagreed about whether the latter had once been offered an inside counter job, while Gary Haagenson told the grievance committee that he was a salaried office manager of the Company with duties of buying lumber and which included hiring and firing employees. Kirkland recalled Rickman's statement that he could do Gary Haagenson's job, that the Ledsinger and Cowan affidavits were rejected, and that Rickman had spoken on his own behalf more than once and for a goodly length of time until objection was raised to his continuing.

Misakian testified that after opening formalities the grievance committee was informed that duties of Gary Haagenson and Rickman differed widely with the only thing in common being union membership and Respondent's classification of them as clerks. He recalled Rickman speaking at length on matters not only about the instant grievance, but a "broader labor relations picture" including the ethics of proprietors having health and welfare programs benefits. Misakian remembered Rickman being once ruled out of order for drifting off the case, and was surprised with the ease by which the Ledsinger and Cowan affidavits were successfully rejected. He testified that Gary Haagenson was cross-examined by Kirkland about his duties, but continued to assert that he not only had the authority to hire and fire but functioned in accordance with historical past practices at Larsen Bros. where either union or nonunion personnel might work the inside counter.

Smothers testified that he recalled Rickman's hearing as being a seniority grievance in which the evidence showed Gary Haagenson was performing unique job functions and had an ownership interest in the Company. As refreshed, his memory included that Gary Haagenson had been shown to be a company manager with buying, personnel, payroll, customer relations, and clerical functions. He recalled that representatives of both parties had asked questions, as did Rickman himself.

Waterman recalled little of the case, essentially only that opening presentations were made and a number of verbal exchanges followed. It seemed from his experience in such matters that the hearing was a difficult one to conduct with "too much going on," and that Rickman had made statements on his own behalf to the point that the grievance committee felt it "got out of hand."

Lusby testified that he prepared minutes of the hearing, and recalled Rickman being questioned by Kirkland about his duties. He also remembered rejection of documents out of a folder Rickman brought, as primarily de-

[8] At least one other grievance was heard by this committee during the October 1 sitting.

cided by Smothers with Misakian and Kirkland in seeming agreement. Lusby recalled Gary Haagenson describing his salaried position with Larsen Bros. as performing sales and office manager duties.

Kunich testified that spokesmen for the parties opened the hearing and Rickman unsuccessfully attempted to read from "a portfolio." He recalled it being established that Gary Haagenson occasionally performed yard work at noontime, and reference was made to an offer of inside counter work to Rickman. Otherwise, Gary Haagenson's duties were outlined as primarily banking and other administrative functions outside a union's jurisdiction. Kunich last recalled how Kirkland once asked Rickman directly if he had anything more to add on the case, and when he did not the grievance committee undertook its deliberations.

C. *Relevant Posthearing Events*

Upon announcement of the grievance committee's disposition Kirkland said simply to Rickman that he should meet with him soon. This occurred on October 4,[9] at which time Rickman delivered the following letter:

> RE: Grievance Hearing of October 1, 1982, in which L.E.M.A. denied to hear or render a decision in regards to my grievance.
>
> As per the above reference, I am directing the Local Union to take this grievance immediately to arbitration. As per the above grievance, I am filing the charges I wish submitted and the awards I expect to be a part of the settlement. However, if there is any reasons why the Union cannot arbitrate these charges, I will be expecting an immediate written reply.
>
> *Charges:*
>
> 1. Larsen Brothers Lumber and Milling Company did violate the Union's Security Clause (Article II(2) and the Seniority Clause (Article X(10)) of the Local Union's Agreement by the Company submitting Mr. Gary Haagenson's name, who the company claims is inside, outside Clerk, plant clerical and now the company manager/co-owner/management and who has the ability to hire and fire—false classification), to the Union for affiliation under the classification of Clerk. But, whose real purpose was/is to derive union benefits; double protection; dual classification; weaken the contractual agreement; weaken, if not destroying the hourly employees' bargaining unit rights under that said Agreement; and weakening, if not stemming any representation under the said Agreement.
>
> 2. Larsen Brothers Lumber and Milling Company did violate Article II(2) and Article VI(6)(B) of the Agreement by the company appointing Mr. Ray Haagenson—who was affiliated with the Union under the classification of Clerk—Vice President, Co-owner/Management of the company, without notifying the Union. Then on July 6, 1981, appointing Mr. Ray Haggenson working foreman (a classification under the Agreement) so as to allow him to perform work of hourly-employees; deriving Union benefits; affording him active union membership; double protection; dual classification; weakening the contractual agreement; weakening, if not destroying the hourly employees' Bargaining Unit rights under that said agreement and weakening, if not stemming any representation under the said Agreement.
>
> *Awards*
>
> That I be made whole in regard to all hours, union benefits, interest on all monies due me, damages which I have incured [sic] and additional credit for time, so I may qualify for my pension.
>
> I wish to thank you for your time and consideration, and I wil be expecting an immediate reply.[10]

On this same date Kirkland dispatched a one line letter to Misakian at LAMEA's office "demand[ing]" arbitration on behalf of Rickman. Not knowing of this Rickman wrote Kirkland again on October 11 to ask the status of his case and in the course of verbal contact at that time learned that Respondent had sought arbitration and was awaiting a response. Kirkland answered the pending request for information with a letter to Rickman dated October 18[11] reading:

> [A]s per our conversation following the grievance procedure, I filed for the arbitration the next day. I have not received conformation [sic] from L.A.M.E.A. but I contacted them by phone and was told I would have that information by the middle of this week. We will take immediate action when we receive this conformation [sic].

However, following the sending of this Kirkland received a letter from Misakian dated October 11. It read:

> The Union's communique of October 4, 1982 wherein arbitration is requested re the above captioned case is without merit in view of the grievance committee's decision of October 1, 1982 in support of the Employer's position to not render a decision on the dispute because the Union lacked jurisdiction in the matter.

Kirkland testified that he had reviewed Lusby's notes of the grievance hearing on the day following, and came to feel that the grievance did not represent "a very good case." Additionally he was provided legal advice that Respondent must go to court before an arbitration could occur. He testified that notwithstanding this he had filed for arbitration in order to comply with the contractual 5-day period for such action. From this Respondent decid-

[9] Rickman testified to remarks at the time of visiting the union office on this date, in which Kirkland said both that he would attempt to have the district council take over arbitration of the matter and that perhaps it should be dropped as a contention relating to Gary Haagenson.

[10] A substitute letter dated October 5 of similar import was furnished to Kirkland by Rickman soon thereafter, with only slight revision in format.

[11] This was also the date Rickman executed the unfair labor practice charge in this proceeding. It was actually docketed as an October 22 filing, and immediately served in due course.

ed to drop the request for arbitration because overall evaluation of Rickman's grievance led Kirkland to believe it could not be won, coupled with a concern for the expense of attempting this.

D. *Collateral Evidence*

To the extent that the nature and quality of representation afforded Rickman is at issue, there was testimony about remarks assertedly or concededly made by Kirkland. In this connection Cowan and Anthony Engel, another member of Respondent, both testified that at a union meeting on September 7 the disposition by the International Union of Rickman's nominating procedure protest had been read aloud by Harold Maines, president of the Local, following which Kirkland was heard to remark that he was having to do things "by the book" because of a certain member who was watching every move being made. Kirkland denied making such comment, and was corroborated in that regard by Maines, Lusby, and Robert Costa, a union member employed with another firm with which Respondent had a contract.

Ledsinger also testified that, on July 22 while presenting a grievance to Kirkland, the latter had remarked that Rickman was a hypocrite for wanting to go "right by the book." Kirkland declared that in late October he had met with Ledsinger about this member's pending grievance, and had observed that it seemed to have been prepared on Rickman's typewriter. He admittedly continued by referring to Rickman as a hypocrite because the situation at Larsen Bros, had existed all the years Rickman was employed there but never "pushed to a grievance" until he was laid off.

E. *Analysis*

The standard for determining whether a labor organization has unlawfully failed to carry a grievance through final dispute resolution is stated in *Bottle Blowers Local 106*, 240 NLRB 324 (1979). The rule is that, once a grievance becomes undertaken, its abandonment short of arbitration is evaluated as an 8(b)(1)(A) issue in terms not of intrinsic merits of the claim but rather whether the union's disposition of such grievance was perfunctory or motivated by ill will or other invidious considerations. Where animus is not present, the question that remains is whether grievance handling was merely perfunctory and thus a violation of the duty of fair representation to employees. The Board terms a "well settled" statement of the principle to be that written in *Service Employees Local 579 (Beverly Manor Convalescent Center)*, 229 NLRB 692, 695 (1977):

> [S]o long as [a union] exercises its discretion in good faith and with honesty of purpose, a collective-bargaining representative is endowed with a wide range of reasonableness in the performance of its duties for the unit it represents. Mere negligence, poor judgment, or ineptitude in grievance handling are insufficient to establish a breach of the duty of fair representation.

While it is argued that hostility and ill will were harbored toward Rickman, this is based largely on evidence that I choose not to credit. I am not persuaded by the testimony of either Engel or Cowan that Kirkland uttered remarks following the reading on September 7 of an election protest disposition letter which impliedly suggested that he was touchy about Rickman's role in union affairs. Aside from the question of whether remarks, if made, even showed actionable animus, I hold that they were not and any testimony to the contrary is mistakenly based on rumor and misconception which those witnesses for the General Counsel had come to believe was fact. Neither Engel nor Cowan was convincing in their offerings on the point, whereas Maines, Lusby,[12] and particularly Costa were each persuasive. Costa projected an excellent demeanor, and I am satisfied that his recollection of commotion and mumbling following contents of the letter being heard by some 60 assembled members is at the root of what Engel and Cowan came to erroneously believe. This credibility resolution was made even more compelling when it is noted that Cowan himself recalled the name Rickman spreading throughout the union hall in whispers, where the letter included his surname and this would have meant that Maines voiced it in the course of his reading.

Rickman testified that, in certain conversations with Kirkland over the several months that the grievance was extant before hearing, the latter was "brash" or "not" with him. I note that Rickman's style of expression, both orally and in writing, has characteristics that are unusual for internal dealings between a rank-and-file member and the chief functionary of a small local union. His letters are overwritten, adumbrative as to meaning, unnecessarily testy, and typically containing an artificially constructed sense of urgency. On the verbal level Rickman was influenced by rigidity of thought, untoward sense of affrontment, and highly ideated mental processes difficult to follow as ordinary discourse would unfold.[13]

Accepting, therefore, that on occasions as the weeks passed Kirkland was abrupt or displayed faintly concealed exasperation as he spoke with Rickman, this element alone is of minor consequence and in overall circumstances of the case totally discountable. I include in this view the admittedly express label of "hypocrite," for such mild disparagement is far from a showing of individually focused hostility, and Rickman himself commented in his testimony that his questioning of management impingement on work of the bargaining unit was traceable to "actually, since 1976." A final point that testimony addressed was that of reaction to John Rickman's presence on occasion of official dealings, and I find no

[12] This witness credibly recalled that Rickman had been at the union meeting until just after the letter was read, yet Rickman did not testify that he heard any remark of Kirkland assertedly made immediately upon Maines' concluding.

[13] The characterizations of this sentence are based on Rickman's strange demurring to an offer of participation in seeking legal advice, on his perception of insult in conversation with Mocine which by his own version should not have been so construed, and on rambling, "stream-of-consciousness" type articulation as frequently exemplified during his testimony.

significance to Kirkland's objection to his involvement or that it was an indicator of animus.[14]

The issue raised by the complaint is therefore treatable in terms of essential procedural handling of Rickman's grievance by Respondent. In the literal sense of pleading, allegations of the complaint fix October 1, and continuing thereafter, as the time at which Respondent's culpability assertedly originated. However, the prehearing activity of Kirkland is quite revealing, for notwithstanding the oddity and difficulty of what was presented to him he effectively investigated the "inherited" problem of how Gary Haagenson's functioning might constitute a contract violation by personal observation at the work place, by interview of two knowledgeable members, by prehearing sessions with both Rickman and Ledsinger to absorb information about the case, and by preparation of the written outline of what he expected to present before the grievance board. The General Counsel's contention of conduct violating the Act attacks how Respondent carried out these procedures on October 1, and steps that followed. However, it is important to emphasize that litigation on this complaint shall not lead to any dispositive findings on whether Gary Haagenson was a lumber clerk as defined in the contract, nor on subsidiary questions of a supervisor holding union membership or the more remote matter of a managerial employee enjoying fringe benefits from union membership. Instead, the issue is that of Respondent's evaluation of a particular grievance in a particular setting, coupled with an analysis of how Kirkland functioned in the course of grievance board procedures on October 1.[15]

It is clear from the composite of all the testimony that the hearing was informal if not mildly disordered. Personalities and aggressiveness made a mark on just what the panel heard. However, even in this sense, Kirkland pressed his case to about its most effective appearance. He elicited responses from both Rickman and Gary Haagenson, and made both an opening and summarizing statement. He was facing a more experienced adversary in Misakian, but nevertheless persevered in voicing his theory that because Gary Haagenson was classified as a clerk his lesser seniority should yield to Rickman for job retention purposes. The grievance board itself was regulator of the process, and the fact that they entertained side comment from Ray Haagenson and ruled Rickman out of order insofar as all he wanted to say are not matters within Kirkland's control. He may have erred in conceding away Ledsinger's affidavit; however, this is just the type of discretion recognized by the Board in its *Beverly Manor* opinion. A second credibility resolution is necessary at this point, and in that regard I reject Rickman's testimony of having been squelched in attempting to state his case. I believe instead, as credibly described in emphatic or less certain fashion by Kirkland, Lusby, Smothers, and Waterman, that Rickman chimed in with as much significant information as the committee was willing to hear given the nature of his grievance. Thus Kirkland, who was highly convincing and is credited concerning his general description of facts, is shown to have been informed, reasonably sympathetic, and diligent, factors which add up to the near opposite of perfunctory grievance handling or failure to present one in its best light. Cf. *Printing & Graphics Communications Local 4 (San Francisco Newspaper Agency)*, 249 NLRB 88 (1980).

From this the decision not to arbitrate must be assessed. Here the key point is that Kirkland satisfactorily explained how he became educated in realizing just how heavy a burden was present in overcoming Larsen Bros.' claim that Gary Haagenson as its sales manager could not be confined to occasional inroads into bargaining unit work, given the history of utilizing personnel at this Company,[16] and the myriad variations in the same regard found in various firms with which Respondent had a labor contract. With Rickman himself having asked that Ledsinger not be brought into the picture, and two regular employees at the site unable to corroborate that Gary Haagenson was in the ordinary course of things performing a lumber clerk's job, Kirkland's declining to take the case to arbitration cannot be seen as some failure to fully or fairly represent. The obstacles were not wholly dissimilar to those described in *Steelworkers Local 7748 (Eaton Corp.)*, 246 NLRB 12 (1979), where the Board dismissed on a similar theory, noting that notwithstanding a grievant's "legal" right to recall, the union there faced "obscure contractual language, as further complicated by the contrary past practice" forcing it to "temper a strict reading of the contract." Cf. *Poole v. Budd Co.*, 706 F.2d 181 (6th Cir. 1983).

It cannot be gainsaid that the current state of "fair representation" doctrine has but complicated the always delicate job of evaluating worker grievances. It also has been authoritatively noted that conflicting claims among types of employees "can be a source of real difficulty for union leadership in grievance handling," and that this "political burden," coupled with "current stress on individual rights," has made even more difficult "the unpleasant duty of screening out grievances that lack contractual merit." Harold W. Davey, *Contemporary Collective Bargaining*, 3d Ed. Prentice Hall, Inc. (1972) pp. 149–150. The principle involved has been broadened on by observation that the right to fair representation "does not, for example, include a right to have one's grievance go all the way to arbitration, regardless of its contractual merit," and that "*it is the contract* that must become the decisive consideration in further processing of a grievance, rather than the personal whims of an individual

[14] To the extent that the matter is in dispute I credit Jenkins and Kirkland in their testimony that John Rickman was introduced as prospective "counsel," thus giving them reason to believe he was a full legal representative of Rickman (James). The General Counsel also asserts in his brief that a formal complaint by Rickman to the U.S. Department of Labor, as made in early October, and the timing of his unfair labor practice charge are both factors that should contribute to an inference of animus. I cannot agree with this belief, and reject both arguments as being merely speculative under all the circumstances present here.

[15] Kirkland's rejection of Rickman's attempted grievance concerning employment practices at El Cerito Lumber was reasonable and customary, for Rickman as a nonemployee of that company had no real standing to grieve.

[16] Bob Jantzen, predecessor to Gary Haagenson, had not been a union member while fulfilling a similar function.

worker. . . ." (Emphasis added.) *Contemporary Collective Bargaining*, supra, p. 150.

Here the relevant contract language is meager in content, and a weak basis from which to extend argument in particular fact situations that are not clearly contemplated. The seniority clause, while generally typical, is without precise definitions by which relative retention rights could be unarguably discerned. Further, there are local practices shown to be present within this lumber supply industry by which management personnel have forayed into bargaining unit work, and this is a particularly common occurrence at Larsen Bros. where a small work force is present and customer relations are personalized in a long-established business. A final factor is that perceptions have colored the fact situation, and I am satisfied that the repeated presence of Gary Haagenson in and around the yard was not to perform basic clerical or lumber handling duties as believed by Cowan and particularly Ledsinger, but was instead expectable special attention to and with customers plus performance of immediately necessary tasks in fulfillment of sales opportunity. See *Steelworkers District 38 (U.S. Steel Corp.)*, 261 NLRB 950 (1982).

To the extent that this litigation raises the issue of whether or not Respondent should have pressed Rickman's grievance to arbitration it is useful to note that particular holdings in recent arbitration cases disclose the inherent problems in prevailing when a contract is essentially silent on the precise point in dispute. In *Navajo Freight Lines*, 56 LA 657 (J. Seidenberg), the practicalities of a small operation were addressed, and no contract violation found when a junior billing clerk was laid off due to lack of work and his duties assigned to remaining members of the employer's "limited office force" where such a step amounted to an allowably "reasonable degree of flexibility of operations that would enable [the employer] to maximize the work output." *Dow Jones & Co.*, 58 LA 329 (H. Gilden), is a reported arbitration decision in which the headnote read:

> Employer had right during reduction in force to retain foreman who was union member but junior to laid-off pressman and to prefer foreman in selection of shift, since employer has right to supervise work through foreman, and absent clear showing that employer waived exercise of right, employer is not controlled in layoffs of and selection of shift by foreman by seniority and priority. Although foreman is member of union, a situation holder and member of press crew, foreman is not automatically covered by all contractual restrictions on employees.

The opinion of *Dow Jones* stated it to be "implicit" in contract interpretation that presence of the words "employee" or "employees" must be understood to refer to and deal solely with "regular employees (as distinguished from foreman and other supervisory personnel) and must be so construed." Past practices at a work place, as is significant at LAMEA facilities, were controlling in *Union Metal Mfg. Co.*, 41 LA 420 (J. Klein), in which no contractual violation was present in application of seniority during reduction in force where a skeleton crew was scheduled for two shifts on the last day of a workweek in accordance with their shift seniority even though three first-shift employees with greater plant seniority did not work where "cross-shifting" of employees in such situations had admittedly not occurred. Here the arbitrator held the employer's right to so decide was within its inherent right to manage the plant and the determination was supported by past practice.

A procedural or technical obstacle that Kirkland would have faced, even assuming an arbitrator would have been more persuadable than the bipartite board which unanimously concluded against Rickman's grievance, is the quantum of evidence that could be mustered. As shown from *National Broadcasting Co.*, 61 LA 872 (R. Nye), a union may be required to meet the burden of proof in establishing that an employer violated a contract when it laid off a qualified senior employee instead of a rival junior employee during reduction in force. These arbitration holdings cover many of the infirmities in Rickman's complaint, but Respondent's most significant dilemma is best exemplified by *Milnor Distributing Co.*, 49 LA 956 (J. Gillingham). The headnote of this reported case provides, in relevant part, as follows:

> Employer did not violate contract providing that "supervisors shall not perform any work covered by this Agreement or accrue any benefits under this Agreement unless they are a member of the appropriate Local Union," when it laid off regular employee with lowest seniority in warehouse, while supervisor continued to perform certain bargaining unit work. (1) Employer has right to select and assign supervisors, and supervisor in question is bona fide and was assigned to warehouse for legitimate and proper reasons; (2) supervisor is in fact a member of appropriate local union; (3) covered work being performed by supervisor is not in excess of that commonly performed by supervisors in various firms covered by contract and is substantially less than amount of work performed by supervisor's predecessor at warehouse.

On the fundamental question of whether, within the intendment of doctrine on the subject, Respondent failed to adequately represent Rickman I hold that a dereliction has not been shown. Respondent was a small local union of limited means with Kirkland as its only functioning representative, and I find from the evidence that he was fully attentive to Rickman's grievance, became dissatisfied with its merits only as facts unfolded over the summer months of 1982, abided the counsel of higher functionaries of the International Union, invoked legal advice in appropriate fashion,[17] tentatively set the matter

[17] Mocine's letter of July 14 introducing the "plant clerical" notion and prospects of negotiating a new classfication has been appropriately considered as to its effect on the issue of how Rickman's grievance was viewed and handled. While I withhold comment on the applicability of plant clerical principles to this fact situation, it suffices to point out that the thought did not truly color any of the steps that Kirkland proceeded to take and was remote in time to the grievance board proceedings in

Continued

for arbitration, and ultimately withdrew it from further processing only because no real hope of success remained.

Accordingly, I render a conclusion of law that Respondent has not violated the Act as alleged, and issue the following recommended[18]

ORDER

The complaint is dismissed in its entirety.

October and tentative pressing on to arbitration by Respondent. For these reasons I find no significance to what the General Counsel attributes in this regard, and discount any claim that Mocine has herself reflected animosity toward Rickman or that her role in advising Respondent contributed in any way toward a failure of according fair representation.

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.